Supreme Court of the United States

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the supreme court of the District in a suit in equity brought to set aside a sale of valuable real estate in the city of Washington, D. C., which was made on the 26th day of March, 1884, by one Richard W. Tyler, as trustee under a certain deed of trust made by one Sarah L. Crane. The appellant, Mrs. Hitz, had been the owner of this real estate, but by means of a deed purporting to be executed by her the title had been transferred to Sarah L. Crane (135), who had executed a deed of trust to Richard W. Tyler to secure the payment of $20,000 to William P. Jenks (137).

The object of this litigation is to limit the estate of Jenks to receiving the entire principal of the debt so secured, with interest at the rate of 8 per cent. per annum, and to prevent his representatives from securing in addition the appellant's equity of redemption in property worth at least $150,000.

On October 30, 1878, the German-American National Bank in Washington failed, and Benjamin U. Keyser was appointed receiver of the bank by the Comptroller of the Currency. In January, 1879, Keyser began a suit in the supreme court of the District of Columbia against Jane C. Hitz, John Hitz, her husband; Sarah L. Crane, William P. Jenks, Richard W. Tyler, and others, by which he sought to have a prior deed of trust, which had been given by Mrs. Hitz to secure the bank, reinstated on the ground that the release of that trust and the execution of the second deed of trust to secure Jenks were fraudulent and void as against the bank. Keyser also asked that Tyler, as trustee under the deed of trust to secure Jenks, should be restrained from a threatened sale of the property (89). A restraining order was granted enjoining the sale until further order of the court (96). On the 21st of February, 1879, a preliminary injunction was granted, to continue "until the final hearing" (96, 97).

On October 21, 1879, Mrs. Hitz filed a cross-bill against Keyser and her codefendants, alleging that she had been induced to execute the deed to Crane by fraud, in ignorance of its contents, and praying for the cancellation of that deed, and also of the deed of trust from Crane to Tyler to secure Jenks, and for an accounting of the rents and profits (107). By an amended cross-bill, filed November 13, 1880, she alleged that her deed to Crane was fraudulently altered, after she had executed it, by inserting after her name the name of her husband as one of the grantors (113). The point of this contention was that at that time in the District of Columbia a deed by a married woman was void unless her husband joined with her in its execution.

The case came on for final hearing in the special term, before Mr. Justice Wylie, and on the 28th of November, 1881, a decree was entered sustaining Mrs. Hitz's claim that the deed by which her title to the property had been conveyed away was void (except as to the interest of her husband, John Hitz, which was that of a tenant by the curtesy). This decree dissolved the pending injunction only in so far as it related to the interest of John Hitz in the property. Keyser, as receiver of the bank under appointment by the Comptroller of the Currency, had been in possession of the property for several years, and the decree directed him to account to the court for the rents collected by him from the time the property came into his possession (116, 117). In view, apparently, of an appeal to the court in general term, Tyler by the decree itself was appointed receiver, to take possession of the property and collect the rents, applying the same, so far as necessary, to the payment of taxes, insurance, and other expenses until the further order of the court. From this decree Keyser, Mrs. Hitz, and Jenks severally appealed to the court in general term—Mrs. Hitz's appeal evidently raising the question whether her husband had any interest in the property as tenant by the curtesy.

On December 15, 1881, this decree was modified by an order which practically made Keyser the receiver in place of Tyler, and required him to bring the rents and profits of the property from month to month into the registry of the court (118).

The court in general term, on December 11, 1883, reversed the decree of the special term, holding that Mrs. Hitz had lost her title to the property. The present case turns very largely upon the construction and effect of this decree of the general term (120, 121, 122). Its provisions which are pertinent to the present case are as follows:

I. That the injunction granted on the 21st of February, 1879, enjoining a sale under the deed of trust to Tyler to

secure Jenks, should be dissolved, and that the decree in special term, in so far as it held that the deed which Mrs. Hitz had assailed was void as to her interest in the property, should be reversed.

II. That Keyser should account for all the rents and profits received by him, both before and after the decree in the special term, and "that the parties aforesaid claiming the said rents and profits have leave to litigate in this cause, and as they may be advised, their respective claims, and that for said purposes this cause be, and the same is hereby, retained."

III. That the order of the special term of December 15, 1881, authorizing the collection of the rents and profits by Keyser, should be revoked; and

"That Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same and to collect the rents and profits and apply the same to the payment of the taxes, insurance, and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court, and from time to time to make report to the court of the manner in which he has discharged his trust."

IV. That, save so far as retained, the bill and cross-bill and amendments thereto, should be dismissed.

The last paragraph of the decree is as follows:

"From this decree Jane C. Hitz, complainant in her cross-bill, and one of the defendants, prays an appeal to the Supreme Court of the United States, which appeal is allowed" (122).

Within twenty days thereafter, on the 31st of December, 1883, the appeal bond of Mrs. Hitz was approved as such and was filed in the cause (123).

Some time in January, 1884, apparently, Keyser, notwithstanding the taking of the appeal and the filing of the *supersedeas* bond, surrendered possession of the property to Tyler, and on March 3, 1884, Tyler, as trustee under the deed of trust from Crane, advertised the property for sale. On the 10th of March following the publication of this advertisement of sale his attention was called to the appeal and *supersedeas* by counsel for Mrs. Hitz (9). Notwithstanding this, Tyler sold the property on March 26, 1884, to Seth Caldwell, Jr., of Philadelphia, Pennsylvania, for the sum of $29,200. On the following day, Tyler conveyed the property to Caldwell (141), and, on the 9th of April following, the property was conveyed by Caldwell and wife to Jenks (142). It is not disputed that Caldwell acted as Jenks' agent in buying the property.

It was to set aside this sale that the present suit was instituted.

After the sale of the property, and on November 13, 1884, in order to determine the controversy over the rents and profits which had been collected by Keyser while he was in possession of the property, the cause was referred to the auditor to state the account of Keyser for rents collected or which should have been collected by him both before and after the order of December 15, 1881, and directing the auditor to report as to the proper distribution of the fund and whether or not any taxes should be paid out of it (124).

On March 31, 1885, the auditor filed his report and accompanying schedules, from which it appeared that prior to December 15, 1881, Keyser, as bank receiver, had collected and distributed among the creditors of the bank $6,175.95, and that subsequently to that date he had deposited in the registry of the court, after deducting his commissions, etc., the sum of $3,963.08 (125, 131, 133), being rents down to and including part of January, 1884.

This fund of over $10,000 was claimed by Mrs. Hitz as her own separate property, by Jenks as properly applicable

to all taxes and assessments due on the property, and by Keyser as an asset of the bank. The auditor made no attempt to dispose of the fund which had been collected by Keyser prior to the order of December 15, 1881, and distributed to the creditors of the bank, but held that the rents collected by him subsequently to that date and paid into the registry of the court should be applied to the payment of the taxes which had accrued since December 15, 1881, only, and that the balance was payable to Mrs. Hitz. On hearing the exceptions filed by all of the parties, the court in general term, July 13, 1885, denied the claim of Mrs. Hitz to any portion of the fund in the registry of the court; found that the net rents in hand would not pay the taxes due, and directed that the fund be paid over to Tyler, as "receiver herein," to be applied to the payment of the taxes and assessments (and interest thereon) accruing prior to the date when Keyser surrendered possession to Tyler as his successor in the receivership (134, 132). The cause was then "referred to the auditor to state the account of said receiver" (134). The opinion of the general term, in pursuance of which this order was entered, is reported in 4 Mackey, 179.

Tyler, as receiver, submitted to the auditor a report dated July 31, 1885, and on August 4, 1885, the report of the auditor thereon was filed (145, 146, 147). The record discloses no notice to any of the other parties in interest of the proceedings before the auditor or of the filing of his report. Such notice was required by the rules of the court (84). The report was never confirmed by the court. There was in force at the time, however, a rule of the court which provided in substance that if no exception was filed to the report of the auditor within thirty days after it was lodged in the clerk's office it should stand confirmed at the next rule day.

From the decree of the general term of July 13, 1885, Mrs. Hitz, in open court, on the same day, appealed to this court (135).

This appeal and her appeal from the decree of December 11, 1883, were heard together in this court, and on November 14, 1887, it affirmed both decrees of the general term (123 U. S., 297). The mandates of this court were filed in the supreme court of the District of Columbia on February 11, 1889 (153, 155). Thereupon, on motion of counsel for defendants, the cause was referred to a special auditor to tax the costs, and on December 1, 1890, the litigation was closed by an order of the court confirming this special auditor's report (162).

Before it was closed, on November 6, 1890, Mrs. Hitz filed her bill in the present cause asking that the sale of the property in question made by Tyler on the 26th of March, 1884, be set aside, because at the time of the sale the property was in the possession and custody of a receiver appointed by the court, and because the decree of the general term of December 11, 1883, had been superseded (11). The bill assigned other reasons for asking that the sale be set aside, but as we shall not argue any of them here, it is not necessary to encumber this brief with a reference to them or to the evidence and proceedings of the court below relating to them. Jenks having died in October, 1886 (11–15), while the original case was pending on appeal in this court, his children, who were also his devisees, were made defendants.

The cause came on for hearing before Mr. Justice Cole, and on November 28, 1899, a decree was entered dismissing the bill with costs (250). Mrs. Hitz appealed to the Court of Appeals (251). That court, on June 6, 1900, affirmed the decree (349). The opinion of the court, which was delivered by Mr. Justice Morris, is in the record (335–348). On the 12th of June, 1900, Mrs. Hitz appealed to this court from the decree of the Court of Appeals, and duly perfected her appeal (349, 350).

It will be seen from the opinion of Mr. Justice Morris that the Court of Appeals held that the sale made by Tyler under the deed of trust to secure Jenks was not void, either

because the property sold at the time of sale was in the possession of the receiver of the court or because the decree of the general term, which the Court of Appeals holds authorized the sale to be made, had been superseded. Because it held the sale was not void, the Court of Appeals deemed it unnecessary to consider two defenses which had been set up, one of these defenses being a claim that the proceedings in the original case, subsequent to the sale, relating to the distribution to be made of the rents collected from the property, first by Keyser and afterwards by Tyler, amounted to a conclusive adjudication against Mrs. Hitz of her contention that the sale was void, and the remaining defense being that she was guilty of such laches in instituting the present suit that the court would not entertain her claim for relief, however well founded it might have been if seasonably presented.

It will be seen that all the appellant asks is the privilege of redeeming her property by paying the full amount of the debt secured by the Crane deed of trust to Tyler. That is the prayer of her bill (12). The indebtedness so secured is $20,000, with interest, at the rate of eight per cent. per annum, till paid (15). The defendants have been collecting the rents of the property, and are asked only to account for the net rents as a credit on the debt. The appellant seeks to get back what, if anything, may remain of her property after the claims of her creditors shall have been satisfied to the last cent, principal and interest.

ASSIGNMENT OF ERRORS.

The court below erred:

I. In holding that the sale of the property in question made by Richard W. Tyler on the 26th day of March, 1884, was valid, notwithstanding the fact that at the time of the sale the property was in his custody as a receiver appointed

by the supreme court of the District of Columbia in general term by its decree of December 11, 1883.

II. In holding that said decree of December 11, 1883, authorized or permitted said Tyler to make said sale.

III. In holding that said sale was valid, notwithstanding the fact that said decree of December 11, 1883, which is claimed to have authorized the sale, had been superseded by the taking of an appeal to this court and the seasonable filing of a supersedeas bond.

IV. In affirming the decree of the supreme court of said District dismissing the appellant's bill and denying her the relief she claimed.

ARGUMENT.

I.

The sale in question was absolutely void, because at the time of the sale the property sold was in the possession of the supreme court of the District, through Tyler, its receiver.

This was the exact question decided in the case of Wiswall *vs.* Sampson, 14 How., 52. In that case, while real estate was held by a receiver it was sold, not as here by a person exercising no judicial authority, but by a marshal, and in pursuance of the writ of a circuit court of the United States, commanding him to execute its judgment by a sale of the property of the defendant in an action at law pending in the circuit court. The opinion of the Supreme Court contains the following passages:

"A party, therefore, holding a judgment which is a prior lien upon the property *the same as a mortgage*, if desirous of enforcing it against the estate after it has been taken into

the care and custody of the court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances whether it is an existing unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly.

* * * * * * *

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. *The property is a fund in court*, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.

* * * * * * *

"As we have already said, it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, *as a fund* to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose. And upon this ground, we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

The same principle has been maintained by this court in many other cases. Thus, in Peale *vs.* Phipps, 14 How., 367, the court laid down the now familiar doctrine that a receiver appointed by a State court could not be sued in that

capacity in a circuit court of the United States, the court saying:

"The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

In Heidritter *vs.* Elizabeth Oilcloth Company, 112 U. S., 294, Mr. Justice Matthews, delivering the unanimous opinion of this court, emphatically reaffirmed the decision in Wiswall *vs.* Sampson. In the Heidritter case property was sold under process of a State court which was in the possession of a district court of the United States when the suit in the State court was begun, but had passed out of the possession of the Federal court at the time of the sale by the State court; yet, even in that case, Mr. Justice Matthews, after quoting from the opinion in Wiswall *vs.* Sampson, that the sale involved in that case "was illegal and void," goes on to say:

"And the same conclusion must prevail here; for, although the sale under the judgments in the State court was not made until after the property had passed from the possession of the district court by delivery to the purchaser at the sale under the decree, yet the initial step on which the sheriff's sale depended—the commencement of the proceedings to enforce the mechanics' lien, asserting the jurisdiction and control of the State court over the property

sold—took place when that property was in the exclusive custody and control of the district court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact, that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed, if no such notice had been required or given. The substantial violation of the jurisdiction of the district court consisted, in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale. The principle applied in Wiswall *vs.* Sampson, *ubi supra*, must be regarded as firmly established in the decisions of this court. It has been often approved and confirmed. Peale *vs.* Phipps, 14 How., 367; Hagan *vs.* Lucas, 10 Pet., 400; Williams *vs.* Benedict, 8 How., 107; Pulliam *vs.* Osborne, 17 How., 471; Taylor *vs.* Carryl, 20 How., 583; Yonley *vs.* Lavender, 21 Wall., 276; People's Bank *vs.* Calhoun, 102 U. S., 256; Barton *vs.* Barbour, 104 U. S., 126; Covell *vs.* Heyman, 111 U. S., 176."

The rule laid down in the case of *Wiswall vs. Sampson*—that where property is in the possession of a receiver duly appointed by a court of chancery it is in the custody of the court, and no valid sale thereof can be made without first obtaining for that purpose the authority of the court which appointed the receiver—has been adhered to by this court from the time that decision was rendered, in December, 1852, until the present time.

See—

Barton *vs.* Barbour, 104 U. S., 126, 129.

Krippendorf *vs.* Hide, 110 U. S., 276.

In re Tyler, petitioner, 149 U. S., 164, 181.

Pittsburg, etc., Railway *vs.* Loan & Trust Co., 172 U. S., 493, 513.

In the case of Tyler, petitioner, it was held that property of the South Carolina Railway Company, which was in the possession of a receiver duly appointed by the circuit court of the United States for the district of South Carolina, was not subject to seizure and levy under a process issuing from a court of the State to enforce the collection of a tax assessed upon the property of the railroad company under the laws of the State. The court there said:

"The property in question was in the custody of the circuit court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth."

* * * * * * *

"No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor."

Citing—

Wiswall *vs.* Sampson, 14 How., 52, and a number of other cases.

* * * * * * *

"The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect to it. The maintenance of the system of checks and

balances characteristic of republican institutions requires the co-ordinate departments of government, whether Federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of a receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In the recent case of Pittsburg, etc., Railway Co. *vs.* Loan and Trust Co., *supra*, this court was called upon to consider what constituted an invasion of the possession of a receiver, and while holding that the facts in that case did not show that the possession of the receiver had been interfered with, it adhered to the doctrine in Wiswall *vs.* Sampson, and said that if the facts of the case had disclosed an actual sale of the property while it was in the possession of receivers pending the proceedings in the foreclosure suits, the doctrine laid down in that case would apply and such sale would have been ineffectual to pass title to the purchaser.

It was there shown that while the property of the railway company was in the custody of receivers appointed by the circuit court of the United States to hold it pending the result of proceedings instituted to foreclose a mortgage upon said property, one Lynde purchased thirty-six bonds secured by a prior mortgage, and it was contended by such purchase Lynde could not acquire a lien under the mortgage

securing the bonds upon the property in the hands of the receivers. The court said:

"We have seen that when Lynde purchased the thirty-six bonds, to secure which with other bonds, the Parkhurst mortgage had been previously executed, the property described in that mortgage and here in question was in the actual custody of the circuit courts of the United States by receivers appointed in the foreclosure suits brought by Roosevelt & Fosdick. The contention of the plaintiff in error is that the property was a fund in those courts to abide the event of the litigation in them, and that, pending the proceedings in those courts and the actual possession of the property, it was impossible that Lynde, by purchasing the thirty-six bonds, could have acquired any lien thereon which the law would recognize and enforce."

"The principal authority cited in support of this contention is Wiswall *vs.* Sampson, 14 Howard, 52–68, in which it was held that while real estate is, 'in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose.'"

"If the rule were otherwise," the court said, "the whole fund might pass from its hands before final decree and the litigation become fruitless. We do not perceive that the principle announced in Wiswall *vs.* Sampson controls the determination of the present case. *If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser.* But nothing was done by Lynde, after the institution of the foreclosure suits and pending proceedings therein, which was inconsistent with or tended to defeat the object of those suits. He only purchased the bonds in question, and such purchase was not hostile to the possession by the circuit courts in the foreclosure suits of the property mortgaged to secure them, simply because by such purchase he succeeded to an interest in the Parkhurst mortgage. The foreclosure suits proceeded to a final decree without any attempt to interfere with the custody and control of the property for the purposes avowed in those suits."

The Federal courts of the United States, as well as the State courts, have regarded as settled law and unquestioned authority the doctrine laid down in Wiswall *vs.* Sampson.

In Virginia, etc., Iron Co. *vs.* Bristol Land Co., 88 Federal Reporter, 134, the circuit court for the western district of Virginia reviewed the decisions of this court, and held that where land of the defendant company was in the custody of a receiver duly appointed to wind up its affairs, a sale of such lands for taxes is void and the purchaser at such sale acquires no title thereunder. The court in its opinion said:

"The chief defense relied on by the defendants in their answers is that Smith, the treasurer of the city of Bristol, having under the provisions of the Virginia tax law, sold the lots in question to the auditor of public accounts of the State of Virginia for the benefit of the Commonwealth and the city of Bristol, that that was a valid sale, and that the other defendants, in pursuance of the provisions of another section of the tax law touching delinquent lands, are simply endeavoring to acquire the title which vested in the auditor for the benefit of the Commonwealth and city of Bristol. If the treasurer, Smith, had no right to invade the jurisdiction of this court, and take control of and dispose of property in the hands of its receiver; if in doing this he was in contempt of this court,—then the court is at a loss to see on what principle he could make a valid sale of this property to the auditor for the benefit of the Commonwealth and the city of Bristol, any more than he could make a valid sale to a private person.

"His authority as a tax-collector to dispose of these lands as delinquent for the non-payment of taxes ceased when the proceedings were instituted for the sequestration of all the property of the Bristol Land Company. *After that no person or officer, whether State or Federal, not even the receiver himself, could sell any of the property except by an order of the court. A sale made in any other way or by any other person is null and void.*"

41 S.W. 699 (Tex. Civ. App.)

In the case of Scott *vs.* Crawford (decided in June, 1891), which was an action by Crawford and others against the

Clark-Plumb Company, a Texas corporation, in which Scott had intervened and asked the court to deliver to him certain lands which he had purchased at a sale by the trustee under a power given in a deed of trust made to secure the payment of certain promissory notes, the court of civil appeals of Texas held that the sale made by such trustee while the property was in the possession of a receiver regularly appointed by the district court of the United States was absolutely void. The court in its opinion follows the decision of this court in Wiswall *vs.* Sampson and says:

"We are inclined to think that the sale made by the trustee while the lands were in the possession of a receiver is void and cannot be sustained (Ellis *vs.* Water Co., 86 Tex., 109; 23 S. W., 862; Wiswall *vs.* Sampson, 14 How., 52). It is true, that in this case the sale had been made under an execution issued by another court than the one in which the receivership was pending and not under and by virtue of a deed of trust and power of sale as in this instance; but the writer at least can see no good reason why the rule should not apply with equal, if not greater force, in the latter case. In Wiswall *vs.* Sampson, *supra*, the Supreme Court of the United States say: 'The settled rule also appears to be that where the subject-matter of the suit in equity is real estate which is taken into the possession of the court pending the litigation by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril.' Again the court says: 'As we have already said, it is safe for the disposition of this case to hold that while the estate is in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise without leave of the court for that purpose, and upon this ground we hold that the sale by the marshal on the two judgments was illegal and void and passed no title to the purchaser.' If this invalidity results from the 'title being bound' when the land is placed in the possession of a receiver, as is declared by this decision, then no sale of any character, whether *under deed of trust*, power of attorney, process of court or otherwise, can affect the title in the hands

of the receiver if made without consent of the court having custody thereof."

Other cases affirming the doctrine of Wiswall *vs.* Sampson are:

Walling *vs.* Miller, 108 N. Y., 172, 177.
Russell *vs.* Railway Co., 68 Tex., 652.
Gay *vs.* Brierfield, 94 Ala., 310.
Dugger *vs.* Collins, 69 Ala., 330.

The court of appeals of Virginia, in a suit which went to that court from the circuit court of the United States for the county of Alexandria, in the District of Columbia, after that county was retroceded to Virginia, held that commissioners to sell (trustees), appointed to execute a decree of the lower court, proceeding to sell under such decree, after an appeal taken and supersedeas bond given, were guilty of a contempt of the appellate court, and their acts were *null* and *void as to the rights of the parties to the appeal.*

McLaughlin *vs.* Janney, 6 Grattan (Va.), 609.

No stronger statement of the doctrine here relied upon is to be found anywhere than in the case of Day *vs.* Postal Telegraph Company, 66 Md., 354, 367, 368, in which case Mr. Chief Justice Alvey, delivering the opinion of the court, said:

"But whatever may have been the purposes and designs of the parties professing to represent these companies in the transactions between them, it is very clear, upon most unquestionable authority, that after the affairs of the New York company had been placed in the hands of receivers by the supreme court of New York, which was on the 3d of May, 1885, and so likewise after receivers had been appointed by the court in this State, nothing could be done whereby the *status* of the affairs of that company could be effectually changed, or its rights in any way lessened or prejudiced, without the sanction of the court having jurisdiction of the subject-matter. Any person relying upon

such transaction for his protection, must show that what was done was done with the sanction of the court. The receiver is but the officer or agent of the court from which he derives his appointment, and his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, *in gremio legis*, for the benefit of whoever may be ultimately determined to be entitled to its possession (High on Rec., secs. 134, 139). And this strict rule forbidding the interference of a third party with the possession of the receiver, without leave of the court, applies without regard to the fact, whether such party claims paramount to or under the right which the receiver was appointed to protect (High on Rec., sec. 139; Evelyn *vs.* Lewis, 3 Hare, 472)."

The doctrine here laid down is simply an amplification of what is said in 2d Daniel's Chan. Pl. and Pr., 1431, 1433 (3d Amer. from 3d Eng. ed.):

"A receiver appointed by this court is appointed on behalf of all parties, not of the plaintiff or of the defendant only; therefore if any loss arises from deficiency in his accounts, the estate must bear it. The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it, and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver.

"The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having prior estates, and the individuals having prior estates must, if they wish to avail themselves of them, apply to the court to bring an ejectment or to be examined *pro inter esse suo*, and this although their right to take possession is clear. In this respect there is no distinction between possession by a receiver and that by sequestrators under a commission of sequestration."

II.

The decree of the general term of December 11, 1883 (120, 121, 122), *did not direct or authorize the sale of the property by Tyler as trustee while he had possession of it as receiver of the court.*

Just what was intended by the court in general term when by the decree in question it appointed Tyler receiver, " with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate," etc., must be gathered from the decree itself and from such parts of the record as are proper to be considered in determining that question. No justice of the supreme court of the District of Columbia who took any part in the determination of the original case of Keyser against Hitz has had anything to do with the present case. Mr. Justice Cole, who heard this case in the special term of the supreme court of the District, was appointed to that court after the institution of the present suit, and before this case was decided in the special term of the supreme court of the District the appellate jurisdiction of the court in general term had been transferred to the new Court of Appeals.

It will be observed that the appeal taken by Mrs. Hitz from the decree of the general term of December 11, 1883, was allowed in the body of the decree (122). The court therefore knew when the decree was signed that the case would come to this court, and that the property must be held until this court should act. The situation was precisely what it was when Mr. Justice Wylie entered the decree in the special term in favor of Mrs. Hitz and an appeal was taken from his decree to the court in general term. He made Keyser trustee of the court to collect the rents and profits pending the appeal. The general term simply substituted Tyler for trustee in place of Keyser pending the appeal to this court. Therefore Tyler was directed (121):

(1.) To take and hold possession of the real estate in question.

(2.) To rent and manage the same, and to collect the rents and profits and to apply the same to the payment of the taxes, insurance, and other proper expenses.

(3.) From time to time to pay the residue of the rents and profits into court.

(4.) From time to time to make report to the court of the manner in which he had discharged his trust.

If it was contemplated that the property should be immediately sold, there would have been no necessity for these cumbersome provisions. In that case the sale would have been made in a few days, and there would have been no occasion for the receiver to pay the rents and profits into court, or to pay taxes, or to make report from time to time of his doings. In that case he would not have collected more than one, or at most two months' rent. The provisions of the decree regarding the trustee's duties are familiar ones when a receiver is appointed to take charge of real estate for a long or indefinite period.

The penalty of Tyler's bond as receiver is significant in this connection. He was required to give a bond in the sum of $5,000 (121, 122). The gross rents of the property during the five preceding years, when it had been in the possession of Keyser first as bank receiver and afterwards as court receiver, averaged only about $213 per month (130, 131, 132).

In consideration of these provisions of the decree and of the improbability, to say the least of it, that the court in general term would deliberately authorize Tyler, pending the hearing of the cause by this court on appeal, to dispose of or part with the possession of the property and put it

beyond the process of this court, it would seem to be indicated clearly enough that what was really intended was that Tyler should remain in possession as receiver pending appeal to this court, just as his predecessor, Keyser, had remained in possession pending the appeal to the court in general term.

Taken in their connection with the other language of the decree, so as to give proper effect to all of it, the words "until a sale shall be made under said deed of trust" can only refer to a possible sale thereafter, to be authorized by the court if the final result of the litigation was found to justify such an order or if the result of the litigation was to entirely lift the hand of the court from the property by the final and lawful termination of the receivership. To attempt to construe these words as authorizing a sale before the result of the litigation was ascertained and while the property was still in the hands of the court is to attempt to give them a wholly forced and unnatural meaning.

The decree does not direct Tyler to turn the property over to any particular person. It does not state whether the property is to be turned over to the purchaser as soon as the property is knocked down to him, or when he makes the deposit required at such auction sales, or when he has paid the purchase price in full. The terms of the sale were not then known. It might well have been that the property would have been sold for part cash and part deferred payments. Was Tyler to determine for himself whether the property should be turned over when the cash payment was made, or whether he was to hold it until all the deferred payments had been made? These and numerous other questions would necessarily have arisen and would have been answered in the decree if the court had contemplated that, without further action by it, Tyler should give up possession of the property.

It is not by any such slipshod phraseology as is relied upon in this connection by the counsel for the appellees that

courts of equity discharge receivers and authorize them to part with the property which they hold for the court.

In Ferguson *vs.* Dent (29 Fed. Rep., 1) a receiver holding property was directed by the final decree to turn it over to one of the parties who by the decree was entitled to it. An attempt was made to supersede this decree, but the bond was fatally defective by omitting the words "and damages." Thereupon the clerk issued a formal order to the receiver to carry the decree into effect by delivering possession of the property in accordance with the decree; but the court revoked this order, holding that it was the duty of the receiver to retain possession until he received a special order of the court to deliver it up; *that a direction in the final decree to deliver it up is not sufficient, whether there is a supersedeas or not.*

So in 2d Daniel's Chancery Pl. & Pr. (3d Am. from 3d Eng. ed., 1447) it is said:

"A receiver, however, is never discharged by decree; but the application for his discharge is usually made by motion, notice whereof should be served on all parties, and the order runs thus, 'That the receiver be discharged from being such receiver, and that he do forthwith pass his final account and pay the balance reported due into the bank or to the person entitled to receive it.'"

And in Beach on Receivers, section 796, it is said:

"The end of the suit—its final adjudication—gives cause for the discharge of the receiver, but does not, *ipso facto*, effect his discharge, which results only from an order or decree of the court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership; and for such purpose only should he be continued in office after a final decree in favor of the defendant, unless there be an appeal."

In the present case Tyler, as receiver, was never discharged. More than a year after the sale the court in gen-

eral term treated him as still receiver by directing him as such to take the fund in the registry of the court and apply it to the payment of taxes on the property (134). There is nothing in the case to even show when it was that he gave up the possession of the property or even to whom he turned it over.

It must be remembered that as long as the property was in the hands of the receiver Mrs. Hitz could neither sell nor mortgage it for the purpose of raising money to pay the debt due Jenks. Nobody would buy it from her and nobody would lend her money upon the security of it while it was in the custody of the court through its receiver. If the receiver had been directed to turn over the possession of the property to himself as trustee, or to Jenks, or to Mrs. Hitz, and had then allowed it to be sold, Mrs. Hitz might have been able to save her property. But the decree of the general term, if properly construed by the court below, rendered her helpless even while the advertisement of the sale was running in the newspapers. It certainly is unusual and extraordinary for a court through its receiver to hold possession of real estate while it is being sold by some person acting under an authority not emanating from the court. We submit that it is at least doubtful whether the general term had the power to do this in the present case.

But, on the whole, it is respectfully submitted that the decree of December 11, 1883, properly construed, did not direct, authorize, or permit Tyler, as trustee, to sell the property which he held as receiver.

III.

If the decree of December 11, 1883, *did authorize or permit Tyler, as trustee, to sell the property which he held as receiver, the superseding of that decree rendered such authorization or permission nugatory, and the sale made under it was absolutely void.*

The case of Goddard *vs.* Ordway (94 U. S., 672) would seem of itself to be decisive of this question. In that case a bill in equity had been filed, by which the complainant sought to have the defendant compelled to pay to him, from time to time, as received, a certain proportion of sums of money paid to the defendant monthly by the Government on a contract for furnishing granite for the erection of the State, War, and Navy Department building in Washington. Pending the suit a receiver was appointed, who collected, from time to time, the proportion of the monthly receipts from the contract which was claimed by the complainant. In the supreme court of the District, in special term, a final decree was made in favor of the complainant. In the general term this decree was reversed. The bill was dismissed and the receiver was directed by the final decree to pay over to the defendant the fund in his hands as receiver. An appeal having been taken to this court and a supersedeas bond having been duly approved and filed, the defendant nevertheless made application to the general term to have the money paid over to him, on the ground that the supersedeas did not affect that part of the decree which required that to be done. Thereupon the complainant applied to this court for relief, and it held that the supersedeas put it beyond the power of the court below to part with the fund pending the appeal. The reason for this conclusion is thus stated in the opinion of this court, which was delivered by Mr. Chief Justice Waite:

"When this appeal was taken, the only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction."

Although Goddard *vs.* Ordway was urged upon the Court of Appeals as conclusive of the question presented to it in this case, the following is all that is contained in the opinion of the Court of Appeals in reference to that case:

"The case of Goddard *vs.* Ordway, 94 U. S., 693, which is principally relied on by the appellant in this connection, presented a very different condition. There, after appeal taken and supersedeas bond given, it was sought in the court below to discharge the receiver and to require him to turn over to the successful party in that court the money previously collected by him as such receiver. This was in the nature of execution of that decree, and this the Supreme Court held should not be done. But that plainly was a very different case from the present. It was not pretended in that case that the receiver should still go on collecting, as though, in consequence of the appeal and supersedeas, the decree had not terminated the further exercise of his functions. There is a very great difference between the conservation of a fund already collected in order to await a final decision on appeal, and the continuance of further collections which might have been made, if the decree had been different."

We think we have shown above that the decree of December 11, 1883, cannot be properly construed as directing Tyler, the new receiver, to turn over the property to somebody else in advance of the action of this court on the appeal which was embodied in that decree. But even if it

did contain such a direction, we cannot see that the foregoing paragraph from the opinion of the court below contains any answer to our contention that the supersedeas nullified such direction. The only supposed distinction between this case and Goddard *vs.* Ordway pointed out in the paragraph in question is that that case contemplated the conservation of a fund already collected and not the continuance of further collections. If in this case Tyler had declined to go on collecting rents after the appeal and an application had been made to the court to compel him to perform his duty in that regard, the suggestion that we are considering might have been pertinent, but we cannot see what it has to do with the question whether, despite the appeal and supersedeas, he could put the property itself out of the control of the process of this court. In Goddard *vs.* Ordway, the defendant Ordway denied that the complainant had any right to the fund. The general term sustained his contention, and in the decree dismissing the bill explicitly directed that the receiver should turn over the fund to the defendant. In this case a defendant claimed a lien on the property which the receiver held, and the decree (as construed by the Court of Appeals, not by us) authorized the receiver to turn over the property to the purchaser at a sale to be made to enforce the lien. If the supersedeas stopped the turning over of the property in the one case, why did it not stop it in the other? In both cases the whole object of the supersedeas was to require the court below to retain possession of the property in controversy pending action by this court, into which the whole case had been removed.

Counsel for the appellee contend that the counsel for Mrs. Hitz should have procured an order from the court in general term or from this court directing the receiver to hold the property pending the appeal, but by the statute regulating supersedeas on appeal to this court (section 1007, R. S. U. S.) no such order is needed when the appeal is taken or the writ of error sued out and the supersedeas bond is

duly approved and filed. As is said by Judge Hammond in a note to Ferguson *vs.* Dent (29 Fed. Rep., 1):

"The order for supersedeas comes by an implication from the statute addressed alike to both the appellate court and the court below."

So, in reply to a similar suggestion, this court said in Goddard *vs.* Ordway, *supra:*

"The supersedeas is not obtained by virtue of any process issued by this court, *but it follows as a matter of law* from a compliance by the appellant with the provisions of the act of Congress in that behalf."

If the conclusion of the Court of Appeals as to the limited scope of the principles laid down in Goddard *vs.* Ordway be correct, it would follow that in no case where real estate is held by a receiver in a Federal court will the parties in interest have any right to have the property retained by the court pending an appeal and supersedeas from a final decree in the court of original jurisdiction. That court could at its pleasure put the property where it would require a new suit to bring it again within the control of the higher court. We submit that not only by Goddard *vs.* Ordway, but by numerous other cases, this court has established the true rule to be that in such cases the inferior tribunal cannot thus "defeat the jurisdiction" of the superior court, and that if anything more is contemplated than preserving the property—or, perhaps, in some cases converting it into money to be held in place of the property itself—permission of the appellate tribunal to which the cause has been transferred must first be obtained.

In the Rio Grande, 23 Wallace, 458, it was held (p. 463) that where, in an admiralty case, a vessel had been taken into custody in the court below and an appeal was pending from its decree, "the appeal stayed the proceedings and the

parties were bound to keep the vessel where it then was, to wit, in the possession of the court. * * * The removal of the vessel pending an appeal to the circuit court was illegal and in violation of the express directions of the statute regulating appeals." The statute referred to provided that, upon sufficient security and notice being given within a certain time to prosecute an appeal with effect, the appeal should be a supersedeas and stay execution.

In Draper *vs.* Davis, 102 U. S., 370 (which, as shown by the report of the same case in 104 U. S., 347, was an appeal from a decree of the supreme court of the District of Columbia directing a sale of real estate), it was held that a supersedeas bond having been filed in time, the court below was "without power at this time to proceed with the execution of the decree appealed from."

In Grant *vs.* Phœnix Mutual Life Insurance Company, 121 U. S., 118 (which also came to this court from the supreme court of the District), a large amount of real estate in the city of Washington had been placed in the hands of a receiver pending a suit in which the rights of a number of conflicting claimants, setting up liens on the real estate or different parts of it, were involved. There was a final decree in the general term appointing a trustee to sell the real estate and bring the proceeds into court, from which Grant, the owner of the property, appealed to this court. (See the case as reported in 121 U. S., 105–111.) Grant afterwards appealed from a subsequent interlocutory order authorizing the receiver to make certain repairs and "to put in proper working condition the machinery and apparatus used in supplying the house with water." This court sustained the interlocutory order on the sole ground that, although there had been an appeal and supersedeas, the order appealed from "was strictly confined to the preservation of the property in litigation."

In Bronson *vs.* La Crosse R. R. Co., 1 Wall., 405, a district court of the United States, in a case in which it had ap-

pointed a receiver to take possession of and operate a railroad, undertook, pending an appeal to this court from a final decree which had been superseded, to turn a part of the road over to a company which was not a party to the suit, and to dispose of part of a fund in the hands of the receiver. This court held that the district court had overlooked the effect of the appeal and was acting upon a misapprehension of its powers and without authority of law.

IV.

DEFENSES.

RES ADJUDICATA.

It will no doubt be again asserted that the complainant is concluded as to the validity of the sale in question by the subsequent proceedings in the case before the auditor and by the court in reviewing the auditor's report; that these proceedings were equivalent to a hearing and determination of that question in favor of Jenks by the auditor, the supreme court of the District, and this court. That such assertions are incorrect and founded upon an entire misapprehension of the nature of the proceedings before the auditor, we think will clearly appear.

The final decree of December 11, 1883, in the general term, was entered more than three months before the sale, and of course under that decree no question could arise as to the validity of the sale subsequently made. The leave given the parties in that decree to litigate further in the case referred to the rents and profits which Keyser had received or should have received prior to the decree in the general term (121).

The formal reference of the case to the auditor for the purpose of stating Keyser's account under the decree in

the general term was not made until the 13th of November, 1884, nearly eight months after the sale, and that reference, like the provision of the final decree in pursuance of which it was made, referred solely to the rents collected by Keyser during his receivership (124), which terminated in January, 1884, shortly after the decree in the general term was entered (132). This order of reference simply directed the auditor to report as to the proper distribution of such funds as might be found for distribution in the cause, and that in making such distribution the auditor should inquire and report as to whether or not any, and, if so, what, taxes should be paid out of the fund. There is not a word in the record to indicate that when this order was made the court knew that the sale had taken place. The report of the auditor made in pursuance of this reference showed that Keyser was chargeable for rents collected prior to the 15th of December, 1881, when he was appointed receiver in the cause, with the net sum of $6,175.95 (131). For rents collected after that date and prior to the time he turned the property over to Tyler, as receiver, after deducting proper charges, the auditor found a balance in the hands of Keyser amounting to $2,804.56 (133).

As to the application of the balance of $6,175.95, rents collected by Keyser while he was acting as receiver of the Garman-American bank and not as receiver appointed by the court, the auditor made no distribution or recommendation, stating that he left "that portion of the distribution to be passed upon by the courts as involving the relative rights of Mrs. Jane C. Hitz and the complainant [Keyser]" (126). As to the balance of $2,804.56 of the rents collected by Keyser as receiver of the court, the auditor found that it should be paid to Mrs. Hitz (133).

Upon exceptions filed by both parties, the auditor's report came on to be heard in the general term in the first instance. That court on the 13th day of July, 1885, made another decree in the case, by which it found that the taxes

and assessments which had accrued on the property prior to January 1, 1879 [Keyser, as receiver of the bank, took possession of the property in December, 1878 (130)], with interest added, would more than absorb the balance of the fund in the registry of the court, and directed that the whole of the fund in court be applied toward the satisfaction of all the taxes and assessments and interest thereon mentioned in Schedule C of the auditor's report (132). Upon examination of this Schedule C (132, 133) it will be seen that the principal of the taxes included therein was over $2,800, and that with interest at 10 per cent. added on the respective items, as the schedule provides, the taxes included in this list would more than absorb the entire fund referred to in the decree of the court. The Court of Appeals in its opinion refers to this fact (340). This list of taxes ends with the tax for the half year ending December 31, 1883. Hence this adjudication did not in any respect touch any question arising out of the sale which was made in March, 1884. It merely held that the deed of trust creditor, while the property was in the hands of the court, after default, was entitled to have the net rents applied to keep down taxes. This decree of July 13, 1885, was affirmed by this court.

But it is insisted by counsel for the appellees in this case that it is shown by the *opinions* of both the court in general term and this court upon this question of the application of the funds in the registry of the court that it was determined that the sale was valid, so that that question is no longer an open one and cannot be considered in this case because it thereby became *res judicata*.

It is true that in the report of the auditor (128), in the opinion of the general term (4 Mack., 179), and in the opinion delivered by Mr. Justice Gray in this court (123 U. S., 297, 306) reference is made to the sale as a fact. The auditor found that the balance of the fund in the registry was payable to Mrs. Hitz (129), so that whatever adjudica-

tion he made was in Mrs. Hitz's favor and need not be further considered. In the opinion of the general term, delivered by Mr. Justice Merrick (4 Mack., 179), it was held that where a court of equity has appointed a receiver of mortgaged premises the rents and profits collected by the receiver, pending the litigation, will be applied to the payment of the mortgage debt when "the corpus fails to satisfy the lien of the mortgage or the deed of trust." The opinion proceeds to say that the rents received by Keyser after he was appointed receiver by the court "will be dedicated, first, to the payment of the arrears of taxes as stated by the auditor, both the past taxes, the current taxes, and the taxes in arrears, and whatever is left after paying those taxes will go to the payment of the balance of the debt secured by the deed of trust."

So in the opinion of Mr. Justice Gray in this court (123 U. S., 297) it is said that since "the sum obtained for the land at a sale under the power contained in this deed proved insufficient by more than the whole of the fund in court to pay the debt of Hitz to Jenks secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund. This, however, disposes of the case independently of the application of part of the fund to the payment of taxes accrued during the pendency of this suit."

In this last sentence, Mr. Justice Gray seems to have understood that only a part of the fund had gone to pay taxes, whereas it had all been applied to the payment of taxes that had accrued before Keyser turned the property over to Tyler.

It will be seen, then, that what was decided by the general term and affirmed by this court was that, without reference to whether or not the property should sell or had been sold for enough to pay the debt due Jenks, accrued taxes and assessments on the property and interest thereon were to be first paid from the rents, and that if there was anything left after the payment of these taxes and assessments it should be applied

to make good the deficiency in the debt arising from the sale of the property for less than enough to pay the debt, interest, and taxes. It also appears that, as a matter of fact, the whole fund was absorbed in the payment of the taxes and assessments. There was then, so far, no opportunity in the case to raise the question whether a surplus should go to Mrs. Hitz, or go to Jenks as a credit on account of the debt as if there had been no sale, or go to Jenks to make up the deficiency arising out of a sale. Suppose, for instance, that Mrs. Hitz had undertaken to say to the court in general term when this account was before it on the auditor's report that the sale was void, and that the surplus over and above the taxes, assessments, and interest should have been paid to her or should have been held by the court to await a valid sale to see whether there would be any deficiency, the obvious reply would have been, there is no surplus, and courts do not sit to determine moot questions.

These taxes had to be paid in the interest of all the parties claiming any right in the property. Whether the deed of trust to Tyler was valid or void, the taxes and penalties were running on and constituted a first lien on the property. We concede that the opinion rendered in a case by an appellate court may be examined for the purpose of clearing up ambiguities in its judgment or decree, but we deny that anything contained in an opinion filed by such a court can apply to the adjudication of a question which was not made up by the record before it, and which could not by any possibility have been made up.

All that either the general term or this court said on this subject was that there had been a sale. This was a fact, as to which there was no controversy. The question involved here is whether that sale was valid. That question was not presented in the former case, and therefore was not decided. It certainly is not a question which is to be considered as having been adjudicated because it might have been raised, because the fund in court was absorbed by

the payment of taxes and assessments accruing prior to the sale in pursuance of a decree made by the court three months before the sale, and no implication can here arise that certain questions might have been raised as to the application of a surplus which never existed.

The appeal of Mrs. Hitz to this court from this decree of the general term of July 13, 1885, was noted by the presiding justice at the foot of the decree itself (135). There was, however, no supersedeas of this decree. While the case was pending on appeal in this court, Tyler, on or a few days prior to August 4, 1885, went into the auditor's office and filed with that officer an account of the rents received by him from the beginning of his term as receiver, December 12, 1883, until the sale of the property was consummated, on the 26th day of March, 1884, the amount so collected by him being $709.96, from which he claimed and was allowed a deduction of $94.74 on account of repairs and his commissions (145). He was also allowed a commission on the fund which he had received from the registry of the court under the decree of July 13, 1885, amounting to $115.90. The result was that there was a balance in his hands of only $402.07. On the 4th of August, 1885, the auditor filed his report in which he stated that he treated this balance of $402.07 "as payable to W. P. Jenks upon account of the deficiency in the payment of his indebtedness by the sale under the deed of trust" (146). The report so filed was never acted upon by the court, and, so far as this record discloses, was never brought to the attention of the court or of any of the parties in interest until after the present suit was begun.

The testimony taken in this case tends strongly to prove that counsel for Mrs. Hitz was never notified of this proceeding before the auditor or of the filing of the auditor's report (85–88). In the court below, counsel for the defendants argued that this proof was insufficient to establish the fact of

want of notice, and no doubt that argument will be repeated here. It is respectfully submitted that no such proof was necessary; that he who claims that his adversary is estopped by a former judgment is bound to show affirmatively that that adversary had notice of the prior proceeding; that in some way he was afforded an opportunity to know what claim was made against him, and given an opportunity to meet that claim.

It must not be overlooked that *when the proceedings before the auditor on both references took place, and when the court in general term took action on the first report, the appeal taken from the decree of the general term of December* 11, 1883, *was pending in this court.* That appeal involved the validity of the deed of trust to Tyler. A supersedeas had been obtained and (unnecessarily) actual notice of the filing of the supersedeas bond had been given to Tyler (9). This was fair notice to Tyler and to his principal, Jenks, that his right to sell pending the appeal was contested. How could it be expected that before this court should decide the main question Mrs. Hitz should do anything further? She could not file a bill attacking the sale on the grounds now relied on, for that would be to assume that there was a deed of trust—the very thing she was litigating. Her contention before the auditor was not that the sale was void, but that, sale or no sale, she was entitled to the rents till the creditor secured by the deed of trust, or his trustee, took possession. The court held that when *it* took possession the creditor was entitled to the intervening rents if it was found that his deed of trust was valid. Everybody saw that if the court should so decide the rents collected by Keyser as receiver of the court would go to Jenks. It was not till Tyler filed *his* report as receiver that there was any surplus over taxes, and when that report was before the auditor there were, as we have seen, no parties before him. Tyler conducted that proceeding alone, and could bind no one by

what he did. No court or judge has taken any action on Tyler's report.

And even if both Mrs. Hitz and Jenks had appeared before the auditor when Tyler's account was being considered, it is hard to see how any question as to the validity of the sale could have been adjudicated. The main case, involving the question whether there was any deed of trust at all, was still pending on appeal in this court, and the question of whether there had been a valid sale under a deed of trust would have had to remain in abeyance pending the determination of the principal controversy.

Again, the controversy before the auditor was as to the distribution of certain sums of money. All that was adjudicated was that the back taxes on the property should be paid as far as the fund in court would go. The controversy now is as to the validity of the sale. Therefore only what was *actually* put in issue and decided in the one case is *res judicata* in the other. The fact that Mrs. Hitz, before the auditor, *might* have objected to the validity of the sale (even if that were the case, which we think we have shown it was not) does not in any way impair her right to raise that question now in a suit upon a different claim or demand.

Cromwell *vs.* County of Sac, 94 U. S., 351, was an action on certain bonds and the coupons thereto attached issued by the county of Sac, in the State of Iowa. There had been a former suit between the same parties upon other coupons of the same bonds, and the question was whether in the second suit the county was concluded as to defenses which might have been set up in the former action, but which were not so set up. In the opinion of the court it is said, upon page 353:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases,

therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Nesbit *vs.* Riverside Independent District, 144 U. S., 610, was an action upon certain school district bonds. In that case, too, there had been a former suit between the same parties upon coupons attached to some of the same bonds. In the first suit, the defense had been made that the bonds were invalid because they were in excess of the amount allowed by law. In the second suit, the defense set up was such invalidity coupled with knowledge of the same by the plaintiff when he acquired the bonds. The first suit was decided in favor of the plaintiff; the second in favor of the defendant, upon the ground that the causes of action being different in the two cases, the defense growing out of knowledge on the part of the plaintiff of the invalidity of the bonds not having been raised in the first action, the defendant had a right to raise it in the second, notwithstanding the fact that he might have relied upon it in the first suit, and might in that way have defeated the original action. In this case Mr. Justice Brewer, after referring to and affirming the decision in Cromwell *vs.* County of Sac, remarks that it was well said in that case that:

"'Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction'" (p. 620).

Dennison *vs.* United States, 168 U. S., 241, was an appeal from the Court of Claims in a suit brought by a supervisor of elections to recover certain fees and disbursements. He had succeeded in a former suit in the Court of Claims, which involved not the same items as those involved in the second suit, but similar items. In the first suit the court had passed on his claim as a whole. Defenses which might have been made to particular items were not in fact made. Hence it was held, following Cromwell *vs.* County of Sac, that the Government was at liberty in the second suit to make objections to particular items which were in all respects like those which had been involved in the former suit, and those objections were sustained.

"The rule has always been regarded as well settled, from the earliest authorities down to the present time, that the judgment, either of a court of concurrent jurisdiction or of a court of exclusive jurisdiction, is not conclusive of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment."

2 Black on Judgments, sec. 611.
Duchess of Kingston's case, 20 How. St. Tr., 538.
Russell *vs.* Place, 94 U. S., 606.
3 Smith's Leading Cases, pp. 2008, 2082.

On all the foregoing grounds, we submit that the question whether the sale of this property by Tyler, trustee, was a valid one is before this court wholly unembarrassed by any former or other adjudication.

AS TO THE DEFENSE OF LACHES.

The question to be considered here is what application, if any, has the doctrine of laches to a bill filed to set aside a *void* sale made by a trustee under a deed of trust?

In the first place, ordinarily the remedy of a party adversely affected by a void sale of real estate would be at law.

If in possession, he could put the purchaser at such a sale to his remedy by ejectment and could set up the defense that the purchaser took no title under the sale at any period of time, however distant. If the purchaser should have been put in possession, the legal owner could himself bring ejectment at any time within twenty years without any regard to the death of parties, the loss of evidence, or fluctuations in value (Phelps *vs.* Harris, 101 U. S., 370, 375; Mackall *vs.* Casilear, 137 U. S., 556, 564).

Mrs. Hitz is prevented in this case from pursuing her remedy at law by ejectment only by the fact that by the deed of trust the legal title became vested in the trustee Tyler. Her equitable title she must assert in a court of equity. Our contention is that in this state of affairs a court of equity will be governed by the analogy of the statute of limitations at law, and that it is not a case where the doctrine of laches has any application whatever.

The leading case in this jurisdiction on this subject is Elmendorf *vs.* Taylor, 10 Wheat., 152–168. There a bill in equity was filed to obtain a conveyance of land held under a grant prior to the one under which the complainant claimed. The suit was not brought until over twenty-one years after the complainant had obtained his patent. Those under which the defendants claimed were of an earlier date. The whole question in the case was whether the case was governed by the analogy of the twenty years' statute of limitations applicable to suits in ejectment or by the thirty years' statute applicable to writs of right. The opinion delivered by Chief Justice Marshall carefully reviews the authorities, and reaches the conclusion that in such cases a suit in equity is barred in twenty years.

This principle was also applied in Hughes *vs.* Edwards, 9 Wheat., 489–497, in which it was held that, in suits by the mortgagee to foreclose a mortgage as well as in bills by the mortgagor to redeem, equity applies the statute of limitations relating to actions of ejectment. And in that case the

rule was applied in the case of a purchaser from the mortgagor. The court says:

"The mortgagor after forfeiture has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest."

In both the foregoing cases it will be seen that there was no remedy at law. There was not in either case concurrent jurisdiction at law and in equity. In every material feature Hughes *vs.* Edwards was like the case at bar, so far as the questions of limitations and laches are concerned.

Cooksey *vs.* Bryan, 2 App. Cas. D. C., 557, was a suit in equity to establish a resulting trust. Mr. Justice Morris, in delivering the opinion of the court, said:

"Under the peculiar circumstances of this case, we cannot regard the defense of laches as available against the heirs of the wife. While, as we have already stated, we must regard with great suspicion an attempt to declare a resulting trust in a transaction that for thirty years and upwards has presented no indication of any such trust, yet it is not to be forgotten that the statute of limitations would not have barred an action of ejectment in this case, if the heirs of the wife had been put to such action; that her disability of coverture precluded the running of the statute during the time of the joint lives of herself and her husband; that the period of ten years allowed for the institution of such a suit by the statute of limitations after the removal of the disability had not elapsed when this bill was filed; and that the very natural mistake of Mrs. Doniphan in supposing herself the owner of the property under the will of her husband, although to some extent only a mistake of law, might very well be regarded as a sufficient excuse for her failure to institute any legal proceedings for the assertion of her rights during her lifetime" (p. 569).

Sis *vs.* Boarman, 11 App. Cas. D. C., 116, was a suit to foreclose a mortgage, which suit was begun more than nineteen years after the maturity of the debt secured by the deed of trust. The reason for resorting to equity was that the

trustee was dead, and one of his heirs was absent from the District of Columbia and his residence was unknown. Among others the defense of laches was relied upon. Mr. Justice Morris, in delivering the opinion of the court, goes at a good deal of length into the authorities, and shows that in such cases the courts of equity are governed by the statute of 21 James I, chapter 16, prescribing the period of twenty years within which an action of ejectment must be instituted.

In Dugan *vs.* Gittings, 3 Gill, 138, a father had verbally promised to give a certain dwelling-house to his daughter upon her marriage; she married relying upon the promise, and with her husband was put in possession of the property by her father. The father lived twenty years afterward without having conveyed the property to his daughter. Nineteen years after his death the daughter filed a bill to have the contract specifically performed. It was held that up to the time of the father's death the husband was entitled to the possession as tenant by the curtesy, therefore the daughter's right to bring the suit did not occur until the father's death; that the analogy of the statute of limitations relating to ejectment governed the case, and that the bill was filed in time.

In Hagerty *vs.* Mann, 56 Md., 522, one of two sureties on an administration bond died, and his estate was settled up and distributed. One of the next of kin, after having sued the remaining surety and obtained judgment against him, execution upon which was returned *nulla bona*, filed a bill against the distributees of the deceased surety to reach in their hands the property that had come to them from the estate of that surety. It was held that such a suit might be brought at any time within twelve years after the expiration of the thirteen months allowed for the distribution of the personal estate of a testator; that an action at law might have been brought on the bond at any time within twelve years after the cause of action accrued, and

that equity would apply the same rule. The court on this subject say, at page 527:

"The defendants have not suffered by receiving money they might not have received if the suit had been brought sooner. They will be no worse off by being obliged to pay the funds they have received than if they had been prevented from receiving them; and in the meantime they have had the use of the money, which they certainly cannot complain of. We can find no case situated like this, or involving circumstances like this, where a party has been held to the rigid rule here sought to be imposed upon the complainant. Most of the cases which have been cited involved a vastly greater period of delay than that in this case; and the cases in which any similar or shorter period was held to involve laches were cases in which parties were under peculiar obligation to act in order to prevent rights of strangers from vesting or attaching, which would not otherwise vest or attach, as in the case of Mason *vs.* Martin, 4 Md., 124, in which objections to the purchase of a trustee at his own sale, were made after two years, and it was held were made too late; and in the case of Clabaugh *vs.* Byerly, 7 Gill, 354, where a party gaining knowledge of circumstances giving him the right to sue, and not acting for seventeen months, was held to have acquiesced. But none of the cases have held that a party who holds a claim which gives him a fixed time within which to sue at law, and having the full period allowed him in which to commence proceedings, has been held to a more rigid restriction in equity, especially when the remedy at law has been lost by accident, unmixed with the fault of the party complainant."

In Manning *vs.* Hayden, 5 Sawyer, 360, an attorney at a judicial sale had bought in, in his own name, property of his client. Two bills were filed by the client to get the property back, one being filed in nine years and the other in eleven years after the defendant had disavowed the trust and given notice that he intended to hold the property as his own. The case was heard before Sawyer, circuit judge, and Deady, district judge. The latter, in the course of the opinion, says that the case had been very thoroughly argued

by able counsel, and had been considered by the court with great care. It was held that the analogy of the twenty years' statute of limitations of law applied to the case. In the opinion, on page 379, it is said:

"In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. As was said in this court in Hall *vs.* Russell, 4 Sawyer, 515: 'When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So in cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law.' Citing Elmendorf *vs.* Taylor, 10 Wheat., 176; Miller *vs.* McIntyre, 6 Pet., 66; Beaubien *vs.* Beaubien, 23 How., 207; to which may be added Wisner *vs.* Barnett, 4 W. C. C., 638; Kane *vs.* Bloodgood, 7 Johns. Ch., 110; and Michoud *vs.* Girod, 4 How., 560. Apply this rule to this case, and this suit may be maintained at any time within twenty years from the fall of 1865, the time when the defendant finally repudiated the arrangement with the Doves, and wrongfully took possession of the premises, that being the period limited by the statute for the commencement of an action at law therefor."

In Cranmer *vs.* McSwords, 24 W. Va., 596–601, certain lands were devised charged with the testator's debts. Other lands, however, were sold to pay the debts. The owner of the land so sold, thirteen years after the sale filed a bill to reach the lands which were charged by the will. It was held that this was purely an equitable remedy; that the statute of limitations had nothing to do with it, but that mere delay for less than twenty years was not sufficient to prevent the plaintiff from maintaining the suit, and that as the principal facts were all established by documentary evidence, laches was no defense. In this case the court quotes in support of its views a passage from the case of

Badger *vs.* Badger, 2 Wall., 93, in which this court, referring to the case of Michoud *vs.* Girod, 4 How., 503, says:

"The facts of the case were clearly established by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able after a great lapse of time to distinguish between their faith and their knowledge."

In Scherer *vs.* Ingerman, 110 Ind., 433, the supreme court of Indiana uses this language:

"There may be cases of statutory proceedings or cases of purely equitable cognizance where the laches of a party may be of such a character and under such circumstances as will bar his right to prosecute his claim in less time than that fixed by the statute of limitations. But that is only in cases where the laches are of such a character and under such circumstances as to work an equitable estoppel."

In the above case a bill was filed to subject realty to sale to pay the debts of a decedent when the personalty proved insufficient, and it was held that the plaintiff had fifteen years from the time the action accrued to file his bill.

But, assuming that the case is one to which the doctrine of laches applies, what are the facts?

The sale was made on the 26th day of March, 1884. The mandate of this court was not signed until November 14, 1887 (153–155), and it was not filed in the supreme court of the District until February 11, 1889 (155). The bill in this case was filed November 6, 1890, nearly a month prior to the confirmation, on December 1, 1890, of the report of the special auditor appointed to tax the costs, which finally ended the original suit.

Counsel for the appellees will contend that the delay in

bringing this suit ran from the date of the sale to the date of the filing of the bill, which was six years, seven months, and ten days.

But we submit that it is unreasonable and unjust in this computation to take any account of the time during which Mrs. Hitz was engaged in endeavoring to support in this court her claim that the deed of trust under which the sale was made was invalid. If she had succeeded in that contention, the sale would have stood canceled as a matter of course. The deed from Tyler, trustee, to Caldwell and the deed from Caldwell to Jenks would have been so much waste paper. Tyler knew this when he made the sale, and Jenks knew it when, through Caldwell, he became the purchaser. In addition to the notice which was given them by the pendency of the suit to which they were parties, Mrs. Hitz's counsel had given them written notice when the sale was advertised that a supersedeas bond had been filed, which notice could have had no other purpose or effect than that of warning both the trustee and the creditor for whom the trustee was acting, and who subsequently himself became the purchaser at the trustee's sale, that Mrs. Hitz would not recognize the sale, but reserved her right to attack it as void.

In Ensminger *vs.* Powers, 108 U. S., 292, the question was whether a bill of review which was not filed within two years from the entering of the decree which it assailed was filed in time. The original decree in that case was made in December, 1873. In January, 1874, the defendants appealed to this court. In December, 1875, the appeal was dismissed because of the failure of the appellants to file and docket the cause in the Supreme Court, and the bill of review was filed in September, 1876, nearly three years after the original decree was entered, yet it was held that because the pendency of the appeal would have been a valid objection to the filing of a bill of review by the appellants, the bill of review was in time, the court saying:

"While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree in pursuance of the prayer of the bill of review because such relief was beyond its control. The time during which that control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal is not to be reckoned against Bridget Powers in this case, although she joined in the appeal."

In Pacific R. R. of Missouri *vs.* Missouri Pacific R'w'y Co., 111 U. S., 505, a bill had been filed to set aside a judicial sale in a foreclosure suit for fraud. The sale was confirmed in October, 1876. An appeal was taken to this court, and it affirmed the sale in April, 1880. The bill attacking the sale for fraud was filed in June, 1880, nearly four years after the sale. The court held that there was no laches in filing the bill; that the time during which the appeal was pending could not be counted against the plaintiff.

Even without reference to the fact that the larger part of the delay in this case was due to the fact that the original suit was pending in this court, the bill in the present case was filed within a reasonable time under the circumstances of this case. Mere delay of itself does not prevent the complainant in a suit in equity from successfully asserting his rights. We do not propose to weary the court by reviewing its numerous decisions upon this subject. They all hold, either expressly or by implication, that the defense of laches is sustainable only where it would be inequitable under the particular circumstances to allow the claim to be enforced, whether that delay be for a few months or for many years. Thus, in Penn Mutual Life Insurance Co. *vs.* Austin, 168 U. S., 685, 698, the court say:

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable

relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

And in Allore *vs.* Jewell, 94 U. S., 506, 512, the court sustained a bill filed by an heir six years after the death of his ancestor to set aside a conveyance made by that ancestor while infirm and mentally weak, the court saying in reference to the objection of laches:

"The objection of the lapse of time—six years—before bringing the suit cannot avail the defendant. If during this time from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having in the manner stated obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them."

In the case at bar there has been no material change whatever in the condition, either of the parties or of the property. The principal point upon which this bill attacks the sale of the property by Tyler, trustee, is that the sale was void because the property was in the hands of a receiver, and because, also, no direction or permission to sell had been given by the court, and if such direction or permission had been given its effect had been nullified by the supersedeas. Everything which is to be considered on either of these points not only grows out of documentary evidence entirely, but that evidence is a part of the records of the very court in which the bill is filed. If all the parties to the controversy had died, there would as to this point be no defect of proof whatever.

In the case of Townsend *vs.* Vanderwerker, 160 U. S., 171, 186 (a case which originated in this jurisdiction), a bill was filed to enforce a contract in respect of real estate nearly ten years after the contract was made and shortly after the death of the other party to the contract, yet this court said in that case:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time had elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. In this case we think the delay is fully explained (Gunton *vs.* Carroll, 101 U. S., 426).

It is in evidence—indeed, we may say it is a circumstance of which any court in the District of Columbia would take judicial notice—that during the period in question Mrs. Hitz was harassed by litigation growing out of the connection of her husband with the German-American national bank, and the use which he had made of his wife's property and rights in endeavoring to sustain that tottering institution. Another suit brought against her by Keyser, as receiver of the bank, in which she had obtained judgment in the courts of the District, was reversed by this court on the 6th day of January, 1890, and sent back for a new trial (133 U. S., 138). The proceedings in the original suit against Jenks, in which Tyler was appointed receiver, were not finally terminated until after the bill in the present suit was filed, for as late as June 16, 1890, the taxation of costs in that case was referred to a special auditor for the reason that the situation as to costs was so complex that the necessary investigation would involve an amount of time and labor which it would embarrass the clerk's office to attend to (159). The report of the special auditor was not acted upon by the court until nearly a month after this suit was

begun (162). As a matter of fact, therefore, the first litigation overlapped the second.

The real estate which Tyler sold remains to this day in the same condition in which it was when Jenks purchased it. The rights of no third party are in any way concerned. Neither Jenks nor his children have changed their position in regard to the property since the sale was made. The debt which the deed of trust to Tyler was given to secure, with interest and all proper expenses incurred in paying taxes, insurance, or repairs, will necessarily still be a lien upon the property if this sale be set aside. By such a course justice to everybody can be done. By refusing it the children of Jenks will be left not only entitled to every dollar of their claim, with interest at eight per cent. per annum until paid, but they will also be declared to be the owners in fee-simple of property in equity belonging to Mrs. Hitz. We are therefore unable to see how the court below could make valid a sale that was absolutely void, nor, under the circumstances of this case, ratify the great wrong which Tyler perpetrated when he offered this property for sale while the title was so involved in litigation that a purchase by anybody but his own principal was out of the question.

We submit that the decrees of the Court of Appeals and of the supreme court of the District of Columbia should be reversed and the case remanded with instructions to enter a decree vacating the sale of March 26, 1884; directing an account in which the appellees shall be credited with the debt secured by the deed of trust and all unpaid interest thereon, at the rate of eight per cent. per annum, and charged with the net rents collected from the property since the sale, and giving Mrs. Hitz a reasonable time to redeem by paying the amount thus shown to be due.

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Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

The brief on behalf of the appellees in this case was not received by counsel for the appellant until the morning of the day the case was reached for argument, so that counsel for the appellant did not even have time to finish reading it before they were summoned to the court. For this reason we asked and obtained leave to file a supplemental brief. The counsel for the appellees were not in fault, as in consequence of an unexpected run on the calendar the case was reached earlier than was anticipated.

As the brief, however, is found to contain some propositions which are entirely new to the case, and others relating to matters which we informed counsel and the court in our original brief we would not raise here, we deem it due to the court as well as to our client that this additional brief should be submitted to the court.

As to the Injunction.

This matter is referred to on pages 8 and 9 of the opposing brief. It is true, as there stated, that we argued in the court below that the supersedeas of the decree of the general term of December 11, 1881, had the effect of continuing in force the injunction then pending and preventing a sale by Tyler under the deed of trust; but in our brief and otherwise we had distinctly notified counsel that we abandoned that contention here. As the matter of the injunction was discussed by counsel for the appellees in the oral argument, and questions in regard to it were asked from the bench, we avail ourselves of this opportunity to explain our position in regard to it.

1. As to the record facts. By one of the prayers of the original bill in the case, which was filed January 10, 1879, Keyser, the complainant, asked for an injunction against Jenks and Tyler from selling the property under the deed of trust (95). On the 21st day of February, 1879, a preliminary injunction was granted in accordance with the prayer of Keyser's bill (96, 97). Mrs. Hitz did not file her cross-bill until October 21, 1879 (107). She did not pray for an injunction (112). Her counsel naturally assumed that it was idle for her to seek to enjoin a sale which stood enjoined already. By the final decree in the special term, which was entered on November 29, 1881, so much of the preliminary injunction as related to the interests of John Hitz as tenant by the curtesy was dissolved (117). The decree in the general term of December 11, 1881, dissolved the preliminary injunction altogether (121). That decree was appealed from and superseded (121, 123).

Our contention in the court below was that the decisions of this court, holding that the supersedeas of a decree dissolving an injunction does not continue the injunction, do

not apply where the original injunction is granted by one court and the decree dissolving it is entered by an *intermediate* court of appeal. We do not now urge this point, and we have stated the situation in regard to it only because counsel on the other side adverted to it in his brief and in his oral argument here.

2. As to the bearing of the foregoing facts upon the question now before this court. We are conceding, it will be seen, for the purpose of simplifying the case as it is presented to this tribunal, that there was no injunction against the sale when the sale was made. We are relying upon the proposition not that there was any order of the court interfering with the sale, but that the court had taken possession of the property, and that a sale could not legally be made by the trustee under the deed of trust while the receiver was in possession. As this matter is vital and was the subject of inquiry by members of the court during the argument, we may be pardoned for submitting the following illustration of what our contention is, and what it is not. Suppose that A has given his promissory note to B and has delivered with it as collateral security certificates of stock in an interest-paying corporation. Afterwards A files a bill in equity against B, setting up that the note and collateral security were obtained from him by fraud, and that he really owes B nothing, and praying that B be enjoined from selling the stock or otherwise enforcing payment of the note. A preliminary injunction issues, which on final hearing is dissolved. From the final decree an appeal is taken and a supersedeas bond duly filed. We are conceding that in such a case B might sell the stock. If A should succeed in reversing the decree, he could go against B for the proceeds of the sale, but the stock itself would be gone. If the decree should be affirmed of course A would have no remedy against anybody. But now suppose further that after the filing of the bill the court ap-

pointed a receiver to take possession of the stock and collect the dividends and to hold both stock and dividends to await the result of the suit, and that by the final decree in the case the bill is dismissed and the receiver directed to turn over the stock in his hands to B. A appeals and supersedes the decree. We contend that in that situation the receiver would comply with the decree at his risk and that the title to the stock would not pass if he should deliver it. This is precisely what was decided by this court in Goddard *vs.* Ordway, 94 U. S., 672, and the other cases referred to on pages 28 and 29 of our original brief.

To meet exactly the present situation we have to suppose a third course: That is, that a receiver has been appointed and has taken possession of the stock and collected the dividends, and by the final decree he is directed not to turn over the stock to B, but to hold it until a sale shall be made by B, and that that decree is superseded. We submit that it is impossible that a decree so worded could have greater effect than a decree that would in positive terms direct the stock to be turned over to B to be sold. Indeed, it is difficult to conceive that any court, while holding the property in its own hands, would attempt to authorize anybody to sell it except for the purpose of bringing the proceeds into court.

The present case differs from the supposed case in this: that the holder of the lien has himself bought the property, and no question arises as to the rights of a third person purchasing in good faith.

Was there any receiver in possession of the real estate involved in this case when Tyler sold it to Jenks?

From the time the bill in the present case was filed until the brief for the appellees in this case was prepared, it had never been suggested by anybody that by any possible view of the case it could be contended that Tyler, as re-

ceiver, was not in possession when Tyler, as trustee, sold the land on the 24th day of March, 1884. But on pages 14 and 15 of the brief for the appellees it is suggested that if our claim as to the effect of the supersedeas is correct, there never was any receiver in the case at all. This result is reached by assuming (1) that Keyser was never appointed receiver, but was in the position of one who held possession of his own property and was directed to pay the rents thereof into the court, and (2) that if the decree of the general term appointing Tyler receiver was superseded, his appointment never became effective.

Manifestly, if either premise of this argument fails, the conclusion falls with it. The fact is that it was expressly adjudicated by the court in general term and by this court that from the 15th day of December, 1881, when the special term modified its decree appointing Tyler receiver, by directing Keyser, who was in possession, to bring the rents into court and to file his bond in the court in the penalty of $5,000, conditioned for the faithful compliance with the order (118), until the decree of the general term of December 11, 1883, Keyser was in possession *as receiver*. From the opinion of the court in general term, reported in 4th Mackey, 179, and the opinion of this court, as reported in 123 U. S., 297, it will be seen that the whole question was whether, during the period just mentioned, the court was in possession of the property through Keyser, as its receiver. Mrs. Hitz was contending that she was entitled to the rents because the mortgagee had never taken possession. Jenks was contending, on the other hand, that when the court took possession, through its receiver, he became entitled to the rents just as though he had taken possession himself. Both courts sustained Jenks' contention. It is sufficient on this point to quote from the opinion of this court as delivered by Mr. Justice Gray (123 U. S., 306). After disposing of other matters the opinion proceeds:

"It only remains to consider her (Mrs. Hitz's) claim to rents and profits. This claim consists of two parts: First, for rents received, with the consent of Hitz, by Keyser, as receiver appointed by the Comptroller of the Currency, of the national bank, from the time of his appointment as such receiver in October, 1878, to the date of the decree of the court below in special term, December 15th, 1881. * * * Second. For rents received by Keyser *under his appointment as receiver by the decree of the court in special term on December 15th, 1881*, and paid by him into the registry of the court, pursuant to that decree, from its date until its reversal in general term on December 11th, 1883. * * * The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; *but the court, through Keyser, as its receiver*, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit."

Indeed, in the brief which was filed in this court in the above case by counsel for Jenks, they used this language:

"Besides, the court had appointed a receiver of the property in question, and had then suspended this appointment and made Keyser (in effect) receiver. Thus it conserved 'not only the *corpus*, but the rents and profits for the satisfaction of the debt'—to use the language of this court in Kountze *vs.* Omaha Hotel Co., 107 U. S., 378–395."

The other premise of the argument of the appellees in this case is equally unfounded. It does not follow at all that because the decree of the general term of December 11, 1883, was superseded that that supersedeas in anywise affected the power of the court below to substitute one custodian of the property for another pending the appeal. Notwithstanding the supersedeas, the court might have had a new receiver every month for the three years during which the case was pending in this court; and there is no question made that Tyler did in fact take possession as receiver immediately after the decree of the general term substituting

him in Keyser's place. On the 13th day of November, 1884, eight months after the sale, the court referred the case to the auditor to state the account of Keyser for rents collected by him "until the possession of said premises passed out of his hands" (124). The report of the auditor shows that Keyser was charged with the rents from December, 1878, until December, 1883 (130, 132), the only amount he was charged with after the latter date being $80.13 in January, 1884, which was, no doubt, money collected by him for rents which had accrued during his term as receiver; and when Tyler subsequently appeared before the auditor in the accounting which he conducted alone, without the aid of, and without notice to, any of the parties to the suit, he charged himself with rents collected "from the beginning of his term of office as such receiver, December 12th, 1883, to the date of the sale of the property in question" (145).

We submit that when counsel, so able and so careful, under such a state of facts, argue to this court on any theory that this property was never in the possession of a receiver at all, it must be because their case to their minds is a desperate one.

The Alleged Recognition of the Sale by the Appellant.

It is insisted on pages 17, 31, and 32 of the brief for the appellees, and was reiterated in the oral argument, that from the time the case was referred to the auditor, in November, 1884, until the decision of this court, in November, 1887, Mrs. Hitz was litigating with Jenks over the question whether the fund in court should be applied to the deficiency in the mortgage debt, and that she fixed the date of the sale as the date to which she was entitled to the rents.

It passes our comprehension how counsel can so mislead themselves. The case was first referred to the auditor by the order of the general term of November 13, 1884, which will be found on page 124 of the record, and that order

confines the reference to an accounting by Keyser for the rents which he had collected before the possession of the premises passed out of his hands (124). The auditor in his report gives in a separate schedule the amount collected by Keyser prior to his appointment as receiver by the order of December 15, 1881 (130). The nêt amount was $6,175.95, and as this money had been distributed by the Comptroller of the Treasury among the creditors of the bank before he was appointed receiver by the court it could not be distributed to anybody (123 U. S., p. 306). The net amount of the rents collected by Keyser subsequent to the order of December 15, 1881, was $3,963.08, and this schedule includes rents from January, 1882, to December, 1883, and the trifling sum of $80.13 hereinabove referred to as of January, 1884 (131, 132). It was this sum of $3,963.08 which was the subject of subsequent proceedings in the court in general term and in this court. The auditor held that this fund could be applied only to the payment of taxes which accrued after December 15, 1881 (129). The decree of the court in general term upon exceptions to the auditor's report filed by all the parties, which decree was made on July 13, 1885, directs that the fund be applied to the payment of taxes that had accrued prior to as well as after the decree in the special term. The decree recites that the taxes which had accrued upon the property prior to January 1, 1879, would more than absorb the balance of the fund, and directs Tyler, as receiver, to take out of the court the entire fund and apply it "towards the satisfaction of all the taxes and assessments and interest thereon," as mentioned in Schedule "C" of the auditor's report (134). This schedule will be found on pages 132 and 133 of the record. This court affirmed the last-mentioned decree. When the question of affirming it was argued here counsel for Jenks, on page 22 of their brief now on file in the case, said:

"Should it be held that the appeal from the disposition of the fund is properly here, and the subject of argument, we shall contend that there was *no error in applying so much of the fund as was so applied to the reduction (pro tanto) of the taxes upon the property.* The trust deed from Miss Crane to Tyler expressly states that it is to secure the payment on demand of all sums that may be advanced by Jenks to keep up 'fire insurance,' and keep down taxes, assessments, &c.—in a prescribed method to be sure—but a method to which the court had, by its injunction, prevented a resort. It was quite right then that the court should use the income of the property *in reducing the burden of taxes* that had accumulated *pendente lite.*"

So that it appears as clearly as any fact in the case that what was decided by the general term and by this court upon the exceptions to the auditor's report was that the fund collected by Keyser before the turning of the property over to his successor in the receivership should not go to Mrs. Hitz, but should *be applied to the payment of taxes on the property;* and counsel for the appellees are entirely wrong, both when they assume that the date down to which the rents collected were in controversy was the date of the sale and when they assume that it was decided that the fund should be applied to meet the deficiency growing out of the sale.

In this connection it is to be observed that, although the order which referred the case to the auditor was not made until November 13, 1884 (124), eight months after the sale, the reference was confined to stating the account of Keyser. If a sale had been made which everybody recognized as valid, Tyler's duties were completed as well as Keyser's, and there was no reason why both accounts should not have been referred to the auditor at the same time. But, whatever the reason, no reference was made of the case to the auditor for the purpose of stating Tyler's account until July 13, 1885, when the general term acted upon the exceptions to the auditor's report on Keyser's transactions. There was then added to the decree of that date a paragraph referring

the case back to the auditor to state Tyler's account as receiver (134); and a few days afterwards Tyler turned up in the auditor's office by himself and obtained from the auditor a report directing him to apply the balance, $380.04, in his hands upon account of the deficiency in the payment of Jenks' indebtedness by the sale under the deed of trust (145–147).

That this *ex parte* proceeding, which was never considered by any court, would not amount to an adjudication that there had been a valid sale is too obvious to require argument. Counsel for the appellees in treating of this subject (see pages 30–32 of their brief) rely entirely upon the proceedings before the auditor and afterwards in the general term and in this court in the settlement of the accounts of Keyser. Nowhere in their brief is there any suggestion, and at no time in the oral argument did they intimate, that the report of the auditor, obtained in this way by Tyler, affected in any degree the right of Mrs. Hitz to raise in this suit the question of the validity of the sale.

Hovey vs. McDonald, 109 U. S., 160–162.

The appellees' counsel insist that Goddard *vs.* Ordway, 94 U. S., 672, if construed correctly by us, has been overruled by this court. On page 29 of their brief they say:

"That an appeal, *though accompanied by a supersedeas bond*, from an order vacating a receivership does not continue in office the receiver, or preserve the fund in his hands, as has been stated, was directly decided by this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162."

The fact is that Hovey *vs.* McDonald, by necessary implication, reaffirms the decision in Goddard *vs.* Ordway. In Hovey *vs.* McDonald the court was dealing with a rule of the supreme court of the District of Columbia relating to

appeals, and to the "principles and rules which relate to chancery proceedings exclusively." The rule in question provided for a supersedeas "only where the judgment is for a specific sum of money," and it did not provide that the appeal itself should operate as a supersedeas in any case or for any length of time. There was no supersedeas under the rule until the proper bond was filed. In that case the bill of complaint was dismissed in special term, and therefore, as this court held, there was no decree for a specific sum of money and no execution could issue in the case, except for costs. For this reason, and because the receiver paid over the fund before the supersedeas bond was filed, this court held that the rule had no application whatever to the case. The opinion then considers the effect of an appeal in chancery proceedings where there is no statute or rule relating to a supersedeas, and merely holds that under such circumstances it is entirely within the discretion of the court whether the fund or property shall be held pending the appeal. On page 159 Mr. Justice Bradley, delivering the opinion, says:

"To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided, and the present revised statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment (R. S., 1007). *This regulation applies to proceedings in equity as well as to cases at law;* but it does not extend to the present case."

The effect of the appeal taken by Mrs. Hitz from the decree of the general term of December 11, 1883, was governed by the statute referred to by Mr. Justice Bradley as amended by the act of February 18, 1875, enlarging the time within which the appeal itself operates as a supersedeas from ten days to sixty days (18 Stat., 318). The supersedeas

bond in question here was filed twenty days after the decree (120, 123).

The whole course of the opinion in Hovey *vs.* McDonald necessarily implies that if the decree of the special term dismissing the bill and directing the receiver to pay the fund in his hands to the defendants had been superseded when the fund was paid over, the receiver would have been liable.

While the approval of the bond given in this case as a supersedeas bond of itself entitles Mrs. Hitz now to all the benefits of a supersedeas without reference to the intention of the court in giving such approval, it should be noted that there was nothing in the decree of December 11, 1883, so far as Mrs. Hitz' interests were concerned, which could be stayed except the sale. If that could go on, a bond for costs would have been all that she required.

Laches.

As during the oral argument inquiries were made from the bench as to the several litigations in which Mrs. Hitz was involved prior to the bringing of this suit, we give here a memorandum in regard to them:

Hitz *vs.* National Metropolitan Bank, 111 U. S., 722.—This case involved the validity of a conveyance (as against creditors) which John Hitz had made to trustees, for the benefit of his wife and children, of his life interest as tenant by the curtesy in certain real estate. It was argued here March 14, 1884, just ten days before the sale of the real estate involved in the present case, and was decided on May 5, 1884. The validity of the deed was sustained.

The case of Keyser *vs.* Hitz, 133 U. S., 139, involved the statutory liability of Mrs. Hitz on two hundred shares of the stock of German-American National Bank which stood in her name. It was argued here October 25, 1889, 12 days before the filing of the bill in the present case, and was de-

cided January 6, 1890. The special term and the general term of the supreme court of the District had decided the case in Mrs. Hitz's favor, but the decision was adverse to her in this court. We are informed that the case was subsequently compromised.

The case of Hitz *vs.* Jenks, 123 U. S., 297, out of which the present case arises, was argued in this court in October, 1887, and was decided on the 14th day of November, 1887.

In the last five pages of their brief counsel for the appellees cite a number of cases, all but one of them in this court, in support of the proposition that a court of equity under certain circumstances will refuse to entertain a suit within a period less than that in which a concurrent action at law will be barred by the statute of limitations. We do not controvert this doctrine, but hold it has no application here. On pages 39 to 45 of our brief we cite a number of cases in this connection, including the leading case in this court of Hughes *vs.* Edwards, 9 Wheat., 489–497, in which it was held that in suits by a mortgagee to foreclose a mortgage, as well as in suits by the mortgagor to redeem, equity applies the statute of limitations relating to actions of ejectment. Most of the cases cited by counsel for the appellees on this point are cases in which the proceeding which the complainant sought to have set aside was one which was only voidable and not void. In this case the sale which the bill seeks to set aside was absolutely void. If there had been no deed of trust upon the property, Mrs. Hitz could have brought her action of ejectment at any time within twenty years without reference to "booms" on F street or any other supposed change in the situation. She was compelled to proceed in a court of chancery simply because she had only an equity of redemption in the property.

So far as the cases relied upon by the appellees bear upon

such a situation, they are in our favor. Thus in Godden *vs.* Kimmell, 99 U. S., 201, it is said :

"In many other cases they (courts of equity) act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate."

And in Galliher *vs.* Caldwell, 145 U. S., 368, it was held that the complainant after fourteen years, delay could not "be permitted to disturb *a title legally perfect* created by the general government."

In the present case the appellant's principal claim is that there was never any legal title in Jenks.

It should be remembered in this connection that if the court had not been in possession of the property by its receiver when the sale was made, Mrs. Hitz might have obtained possession from Keyser. In that case if the sale had been made she could have put Jenks to his action of ejectment. A court of equity by its own possession kept her out of possession while an attempt was made to divest her title, and that court should not now put her in a worse position than she would have been if the court had taken its hands off the property and allowed her an equal opportunity with her creditor to obtain the advantage which the law gives to the party in possession of real estate when the title is controverted.

And while dealing with this subject of laches we beg to remind the court that while we have endeavored to render it unnecessary for it to go into the questions of fact which were involved in the argument in the case as presented to the court below by resting our case here upon a question of law apparent on the face of the record, we do not at all agree with counsel for the appellees as to the facts which they have sought to bring before the court in their brief,

although advised by our brief that it was unnecessary to trouble this court to consider them. We do not agree, for instance, that the rise in the value of this property occurred just before the bill was filed. An examination of the evidence on this subject, we think, will show that the rise in values on Ninth street, in the neighborhood of the Patent Office, had begun before the sale of this property to Jenks by Tyler. (See complainant's witnesses Burford, 77, 78; Saunders, 240; Emery, 250; defendants' witnesses, Prescott, 168, 169; Duncanson, 181, 187; Edson, 213; Holtzman, 233.)

On the whole, we submit that there is nothing in the brief to which this is a reply which should prevent the court from complying with the prayer of the bill (12) that the sale be set aside and Mrs. Hitz "allowed to redeem said property by paying to the heirs of said Jenks what may be found to be due on an account stated in reference to said property."

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